U.S. Department of Labor

Office of Administrative Law Judges
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MAILED: 12/19/2000

IN THE MATTER OF:	*	
David S. Faulkingham	*	
Claimant	*	Case No.: 2000-LHC-0386
Against	*	OWCP No.: 1-140289
Bath Iron Works Corporation	*	
Employer/Self-Insurer	*	

APPEARANCES:

Marcia J. Cleveland, Esq.
For the Claimant

Joseph M. Hochadel, Esq.
Carol G. McMannus, Esq.
For the Employer/Self-Insurer

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on April 19, 2000 in Portland, Maine, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, and EX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	Item	Filing Date
CX 13A	Attorney Cleveland's letter confirming the briefing schedule	05/26/00
CX 13B	Claimant's brief	06/29/00
CX 14	Deposition Testimony of Roger Wickenden, M.D. given on April 14, 2000	06/29/00
CX 15	Deposition Testimony of Arthur M. Stevens, Jr. on April 4, 2000	06/29/00
EX 7	Employer's brief	07/05/00
EX 8	Employer's reply brief	07/10/00
CX 16	Attorney Cleveland's letter filing the	07/14/00
CX 17	Progress notes of Dr. Wickenden	07/14/00
CX 18	Employer's July 11, 2000 letter to Claimant's counsel	07/14/00
CX 19	Attorney Cleveland's letter filing her	07/24/00
CX 20	Fee Petition	07/24/00
EX 9	Employer's comments on the fee petition	07/28/00
ALJ EX 8	This Court's **ORDER** giving the Employer thirty (30)	08/10/00

	days to file a response to CX 16[1]	
EX 10	Employer's letter clarifying the relief being paid to Claimant	08/25/00

The record was closed on August 25, 2000 as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. On or about April 7, 1997 Claimant suffered a gradual injury to both knees in the course and scope of his employment.

4. Claimant gave the Employer notice of the injury in a timely manner on or about April 4, 1997.

5. Claimant filed a timely claim for compensation on or about April 9, 1997 and the Employer filed a timely notice of controversion on or about April 4, 1997.

6. The claim for compensation is dated April 9, 1997 and the Employer's notice of controversion is dated April 4, 1997.

7. The parties attended an informal conference on September 16, 1999.

8. The applicable average weekly wage is $716.59.

9. The Employer voluntarily and without an award has paid temporary total compensation from June 26, 1997 through January

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[1]As no response was filed, CX 17 is admitted into evidence as a full exhibit.

8, 1998 and permanent partial disability from January 9, 1998 through July 11, 1999 for a total of 78 weeks of permanent benefits. The Employer resumed payment of temporary total benefits as of the date of his August 8, 2000 surgery. (EX 10)

The unresolved issues in this proceeding are:

1. Whether any current disability is causally related to his maritime employment.

2. If so, the nature and extent of Claimant's disability.

3. The date of his maximum medical improvement.

4. Claimant's entitlement to medical benefits, including bilateral knee replacements, subject to the provisions of Section 7 of the Act.

Summary of the Evidence

David S. Faulkingham ("Claimant" herein), sixty-four (64) years of age, with a high school education and an employment history of manual labor, began working on November 12, 1968 as an electrician at the Bath, Maine shipyard of the Bath Iron Works Corporation ("Employer"), a maritime facility adjacent to the navigable waters of the Kennebec River where the Employer builds, repairs and overhauls vessels. As an electrician Claimant had duties of setting up the various switchboards on board the vessels, Claimant remarking that such work involved much climbing and walking throughout the various compartments of the vessel for at least eighty (80%) of his work shift and that he often had to crawl to gain access to the tight and confined spaces in which he had to work, sometimes on his back or in a kneeling position. Claimant's work required that he carry heavy cables and other material and supplies to his work site. Claimant's personnel records reflect that he was laid-off on September 29, 1972 because of a "lack of work, returned to the shipyard on December 10, 1973, left the shipyard on July 9, 1976 to become self-employed, and returned to the shipyard, again as an electrician on October 16, 1978, and he remained in that job classification until he had to stop working to undergo surgery on his knee. (TR 17-21; CX 9)

The Employer's shipyard infirmary records reflect that on April 2, 1997 Claimant reported to on-duty personnel there that his maritime employment, especially the frequent climbing up/down the ladders on the vessels, had resulted in bilateral knee problems. (CX 13) Claimant was then seen by Wayne W. McFarland, FNP, on April 7, 1997, and Mr. McFarland took the following report (**Id.**):

"**Subjective:** Mr. Faulkingham is a 61 year-old electrician presenting with at least a 3-month history of bilateral knee pain particularly when descending ladders and getting up from a kneeling position. There has been no history of trauma but the patient indicates he works on his knees a great deal. Symptoms include pain as above and a "giving out sensation" when walking or climbing down ladders. He has no morning stiffness or swelling. Past medical history - noncontributory. He takes no medications and has no known drug allergies. Currently he is working on Hull 462, which has improved his condition however when he works on the Ways he has a great deal of difficulty.

"**Objective:** WD, WN male in NAD. Knees: there is no soft-tissue swelling or inflammation. Range of motion is normal without crepitation. Patella compression test is positive bilaterally, right > left. McMurray's, Drawer's and Lachman's maneuvers are negative. Measurement: thighs measured 15cm proximal to the superior patella edge: right 55cm, left 54c; calf measured 10cm distal to the inferior patella edge: right 46cm, left 42cm. X-rays today show DJD without apparent effusion.

"**Assessment:** Bilateral patellofemoral pain, right > left

"**Plan:** 1. Limitations are issued (see M-1 form this date);
2. Physical therapy referral for evaluation and treatment;
3. Follow-up in 6 weeks."

Claimant continued working on light duty restrictions against kneeling, crawling or squatting; climbing ladders was permitted on a "minimal" basis. (**Id.**) Claimant's bilateral knee symptoms persisted and he was referred to Dr. Roger W. Wickenden, an orthopedic surgeon, for further evaluation. The doctor examined Claimant on May 8, 1997, at which time he took the following history report from the Claimant (CX 12):

"Mr. Faulkingham is referred from Dr. Mohlie's office. He is a 62 year old gentleman who has worked at Bath Iron Works since 1968. He works as an electrician. He states that he works on switchboards, putting cables into the boards. He is very frequently and has over the past many years worked on his knees for prolonged periods of time. He is frequently working in uneven or closed areas where he has to kneel or squat to do his job. He states that he's had no specific injury to his knee but has had progressive problems with anterior and medial joint line pain. He has difficulty going up and down stairs, especially going down stairs. He frequently has the sense that his legs are going to buckle. He's never had a frank locking episode. He's never had significant swelling. His right knee is more bothersome than the left. He states that when he saw Dr. Mohlie he was given a 2 week supply of Ibuprofen 800 mg. to take 1 p.o. tid. This seemed to be helping his pain but it caused increasing thirst... Patient states that he has stiffness in his knees after periods of inactivity such as riding in a car. He states that his knees feel "tired". He has difficulty doing any repetitive kneeling, squatting, crawling, going up and down stairs. Patient has had no prior operative procedures. He is generally otherwise healthy. He denies any serious underlying or pre-existing medical problems," according to the doctor.

Dr. Wickenden, after reviewing Claimant's diagnostic tests and after the physical examination, concluded as follows (**Id.**):

"It is my impression that Mr. Faulkingham's symptoms are on the basis of degenerative osteoarthritis. I suspect that this is directly related to the patient's 30 years of kneeling, squatting, crawling, working in a flexed position, kneeling on the ships decks.

"I have advised Mr. Faulkingham that he needs to try to limit his kneeling, squatting, crawling whenever he can. He would be better to use knee pads or to sit down and totally avoid direct weightbearing on his knees. He is given samples of Daypro to take 2 tablets 1.2 gm. p.o. daily, always with his largest meal. Hopefully this will not cause the side effects he was having with his other medication. I've also advised him to use ice to his knees. He should try very hard to work on a weight reduction program. He will be seen back by me in 4 to 6 weeks for reassessment. If he has not had significant improvement of his symptoms at that time I very likely would talk to him about injecting either the right or the left or both knees," according

to the doctor.

Claimant again went to the Employer's yard clinic and Mr. McFarland states as follows in his May 19, 1997 report (EX 1):

"**Subjective:** Mr. Faulkingham returns in follow-up after being referred for orthopedic evaluation by his personal physician. He states he found basically that which was found here, started on a non-steroidal, anti-inflammatory medication and told to lose some weight. His knees feel more or less the same despite physical therapy.

"**Objective:** I am in receipt of a medical evaluation by Dr. Roger Wickenden.

"**Assessment:** DJD

"**Plan:** 1. His restrictions were continued by Dr. Wickenden who will see him back within several weeks.

2. No further involvement here at this time."

Dr. Wickenden states as follows in his June 26, 1997 history report (CX 12):

HISTORY OF PRESENT ILLNESS: This patient is a 62-year-old man who has worked at BIW for 28 years as an electrician. He does a lot of kneeling and climbing in the course of his work. He has had no particular injury to his knees but has recently been having increasing trouble with both knees, the right worse than the left. He has pain at the medial aspect of his knees. The right knee tends to give out on him. He has frequent popping in the right knee. It bothers him to walk on uneven ground. He has difficulty going down ladders. It does not usually bother him to sleep. It is usually comfortable when he first gets out of bed in the morning and then gets worse after he has been up and about on the knee for two to three hours. He was referred to Dr. Roger Wickenden for this problem by Dr. Mohlie and first seen by him on May 8, 1997. On physical examination the patient is a somewhat overweight 62-year-old man with mild varus alignment of both knees. He has full extension and flexion to 135 degrees bilaterally. He has mild laxity on valgus stress of the knee consistent with degenerative changes. He has a negative Lachman and drawer sign. He has mild discomfort with McMurray testing and I could not reproduce the click. He does

have crepitus on range of motion of the knee. He has no pain on manipulation of the patella. X-rays of the right knee nonweightbearing showed hypertrophic changes at the medial femoral condyle worse on the right knee than on the left. Weightbearing films in our office on May 8, 1997 showed thinning of the articular cartilage in the medial compartment bilaterally, and minimal degenerative changes in the lateral compartment. An MRI was then obtained of the right knee on June 13, 1997 that showed extensive tearing and degenerative change in the medial meniscus and associated osteonecrosis in the outer aspect of the medial tibial plateau. He also had abnormal signal in the medial collateral ligament though no evidence of complete disruption. He and Dr. Roger Wickenden have discussed his treatment options. It is felt that his symptoms are on the basis of degenerative arthritis and torn medial meniscus related to his work. He would now like to proceed with arthroscopy and partial medial meniscectomy with joint debridement and lavage. He understands that this will not cure his entire problem. It will not fix the degenerative arthritis. Hopefully it will decrease his symptoms. He understands the risks and goals of surgery and would like to proceed with that...

"**IMPRESSION:**

1. Right knee pain secondary to degenerative arthritis and torn medial meniscus.

2. Anemia with a hematocrit of 34.5 of undetermined etiology but negative workup at this time.

3. Obesity.

4. Difficulty with spinal anesthetic around 1982.

"**PLAN:** Right knee arthroscopy, partial medial meniscectomy and joint debridement. **The patient refuses spinal anesthesia**...

PREOPERATIVE DIAGNOSIS: Chronic right knee pain secondary to degenerative arthritis and a torn medial meniscus.

POSTOPERATIVE DIAGNOSIS:

1. Extensive complex tearing of medial meniscus, mid and posterior portions.

2. Grade 4 chondromalacia of the

medial tibial plateau underlying meniscus tear.

3. Grade 2 chondromalacia of mid weightbearing surface, medial femoral condyle.

SURGEON: R. Wickenden ANES: Solley - General anesthesia

PROCEDURE: Diagnostic arthroscopy, right knee, with partial medial meniscectomy, joint debridement and lavage."

Dr. Wickenden continued to see Claimant as needed and Claimant underwent right knee arthroscopic surgery with partial medial meniscectomy on June 26, 1997 and, according to the July 8, 1997 report of the doctor's physician assistant (CX 12):

"He is 12 days post arthroscopy right knee at which time, he was found to have extensive complex tear of the medial meniscus, Grade IV chondromalacia of the medial tibial plateau, Grade II chondromalacia of the medial femoral condyle. He underwent partial medial meniscectomy and joint debridement. He is doing acceptably well considering his operative findings. His mobility and range of motion are gradually improving. He still has pain especially if he has been up on the leg for a few hours. It still bothers him to pivot on the knee or walk on uneven ground. At time, it bothers him to sleep. He was taking Vicodin several times a day, then down to 2 qhs and is now taking one qhs.

"On exam, his wounds are well healed. He has little or no effusion. He has full extension of the knee and flexion to 120 degrees. He is easily able to straight leg raise. I reviewed his operative findings with him and showed him the model of the knee. He has mild varus alignment of his knees and I have explained to him that the arthritis in the medial compartment of the knee is likely to continue to be a problem. His knee is not going to be normal. It is too soon to say yet how much benefit he is going to get from the recent arthroscopy. I have encouraged him to continue work on range of motion, try to lose some weight though I fully understand the difficulty doing that when he cannot be as mobile as he would like to be. I have urged him to swim, ride a stationary bike. He does not feel he is capable of working yet and will remain out of work for the time being. He was taking Daypro preoperatively but did not

really get much benefit from that. I did not start him on any NSAID today. That may be a consideration when he returns to see Dr. Roger Wickenden depending on his symptoms. He will return for followup in 2-3 weeks, call sooner p.r.n.," according to the doctor.

Claimant's symptoms continued and on July 29, 1997 the doctor recommended a left knee MRI "to rule out (a) meniscus tear" and, as of August 19, 1997, Dr. Wickenden reported (EX 4):

"He had an MRI of the left knee which shows exactly the same findings as on the right knee with degenerative changes and extensive tearing of the medial meniscus, some overlying degenerative arthritis as well. I feel he should have arthroscopy with partial medial meniscectomy and joint debridement. He understands this is not going to be curative but hopefully will allow him increased activity and relief of pain as he had on the right. He will continue to be up and active but not return to work until after left knee arthroscopy. I feel his left knee symptoms are also work related from a life long job of kneeling, squatting, crawling and climbing. He will be seen for preop H&P."

Dr. Wickenden reported as follows in his September 4, 1997 history and physical examination report (CX 12):

"**CHIEF COMPLAINT:** Left knee pain.

"**HISTORY OF PRESENT ILLNESS:** This patient is a 62-year-old man who has worked at BIW for 28 years as an electrician. He does a lot of kneeling and climbing in the course of his work. This year he has gradually developed increasing trouble with both knees. The right was more symptomatic than the left. He has pain at the medial aspect of his knees. He was initially evaluated for this problem by Dr. Mohlie and then referred to Dr. Roger Wickenden and has been followed by him since May 1997. Th right knee was evaluated first and he was found to have mild degenerative changes in the medial compartment bilaterally on x-rays of the knees in May 1997. An MRI was obtained of the right knee in June 1997 that showed extensive tearing of the medial meniscus and osteonecrosis of the medial tibial plateau. He then underwent arthroscopy of the right knee with partial medial meniscectomy and debridement and lavage. That knee is doing well. The left knee remains quite bothersome. He has pain in the left knee particularly medially. He has frequent catching

in the knee. On exam of the left knee he has 2.5 cm relative atrophy of the left knee measured 10 cm above the superior pole of the patella. He has full extension of the knee and flexion to 135 degrees. He has no significant ligamentous instability. He does have mild discomfort with McMurray testing. An MRI was done of the left knee in August 1997 which showed the same findings as in the right knee with degenerative changes and extensive tearing of the medial meniscus with overlying degenerative arthritis. It has been recommended that he undergo arthroscopy and partial medial meniscectomy and joint debridement of the left knee. He understands the risks and goals of surgery and would like to proceed with that...

"**IMPRESSION:** 1. Left knee pain secondary to torn medial meniscus and degenerative changes.

2. Status post arthroscopy of the right knee in June 1997 for torn medial meniscus and degenerative change.

3. Past history of detached retina in the left eye.

4. Strong family history of heart disease.

5. History of anemia. 6. Obesity.

"**PLAN:** Surgery as above."

Claimant's left knee surgery, scheduled for September 4, 1997, was postponed because he "was hypertensive" at that time and the surgery took place on October 16, 1997, at which time the doctor reported as follows (CX 12):

"**IMPRESSION:** 1. Left knee pain secondary to torn medial meniscus and degenerative changes.

2. Status post arthroscopy, right knee in June 1997 for torn medial meniscus and degenerative change.

3. Hypertension.

4. Strong family history of heart disease.

5. Past history of detached retina of the left eye.

6. History of anemia.

7. Obesity.

8. History of hypercholesterolemia.

"**PLAN:** Surgery as above...

PREOPERATIVE DIAGNOSIS: Chronic left knee pain with probable torn medial meniscus and degenerative arthritis.

POSTOPERATIVE DIAGNOSIS: 1. Complex tearing of the medial meniscus, left knee, with grade 3 chondromalacia of the medial femoral condyle and grade 4 chondromalacia of the anterior peripheral margin of the medial tibial plateau.

SURGEON: R. Wickenden ANES: Maddox - General anesthesia

PROCEDURE: Diagnostic arthroscopy, left knee, with arthroscopic partial medial meniscectomy, debridement and shaving of medial femoral condyle and medial tibial plateau."

As of October 28, 1997 Dr. Wickenden stated as follows (CX 12):

"Mr. Faulkingham is seen in follow up from arthroscopy on October 16, 1997. At surgery, he was found to have a complex tear of the medial meniscus with Grade III chondromalacia of the medial femoral condyle, Grade IV chondromalacia of the medial tibial plateau underlying the meniscal tear. He is doing nicely, wounds are well healed. He has much less sense of instability, much less crepitus and swelling in the knee. He does have severe underlying degenerative changes with bone/on/bone in medial compartment of both knees. He is released to return to work as of November 3, 1997 but he needs to remain on permanent rather marked limitations in function. He needs to avoid kneeling, squatting, crawling permanently. He

should not climb ladders or scaffolding. He may go up one flight of stairs and down one flight of stairs per shift. He should never have to lift greater than 15% on a repetitive basis. He will be seen in 6 weeks for reassessment. I have encouraged to work hard on weight reduction and to try to walk as much as comfort allows."

As of December 30, 1997 Dr. Wickenden reported as follows (CX 12):

"Mr. Faulkingham is doing nicely at the present time. He has minimal discomfort in his knee. He feels he is functioning quite well with the restrictions as previously outlined. He is discharged from my care with permanent restrictions on kneeling, squatting, crawling. He is advised if he has problems, he should contact our office. He will be seen p.r.n. He does understand that weight reduction would be most beneficial and he likely at some point in the future will need total knee replacement."

Dr. Wickenden sent the following letter to the Employer on January 9, 1998 (EX 4):

"I am in receipt of your letter of January 7, 1998.

"I do feel that Mr. Faulkingham has reached his maximum medical level of improvement. He does have bilateral, rather severe degenerative arthritis of both knees. He has had torn menisci in both knees. He has permanent impairment of function in his knees.

"I do feel that Mr. Faulkingham needs to continue to limit his kneeling, squatting, crawling activities. He clearly would not do well on ladders or scaffolding on a repetitive basis especially if he is carrying weight up and down the ladders or stairs. I feel that he should still limit his stair climbing to one flight up, one flight down on a permanent basis. This would be one flight up per shift and one flight down per shift. He should also limit his repetitive lifting to fifteen pounds at a time. These restrictions will be on a permanent basis because of the rather severe bilateral knee arthritis."

Dr. Wickenden sent the following letter to the Employer on April 23, 1998 (CX 12):

"As I review Mr. Faulkingham's operative report and operative

photos it is apparent that he has significant degenerative arthritis in both knees primarily involving the medial compartment, the medial femoral condyle and the medial tibial plateau as well as having degenerative changes with tearing of the medial meniscus. He had very similar findings in both knees and I feel that both are caused by repetitive trauma of many years on the job, as I have outlined in previous communications.

"I would place Mr. Faulkingham's impairment at 20% impairment of each lower extremity, that being 20% on the right and 20% on the left. This is based on the findings of a torn medial meniscus with Grade IV chondromalacia of the medial tibial plateau and Grade III chondromalacia of the medial femoral condyle bilaterally. This combined bilateral 40% impairment of physical function of the lower extremities would convert to a 16% whole person permanent impairment. These values are on the basis of the AMA **Guides to the Evaluation of Permanent Impairment**," according to the doctor.

As of October 9, 1998 Dr. Wickenden reported as follows (CX 12):

"Mr. Faulkingham is seen in follow up of his bilateral knee symptoms. He has had increasing problems, especially in the right knee, over the past several months. He has pain with weightbearing, going down ramps, going down stairs. He has stiffness with prolonged sitting and riding in a car. He has had no knee joint effusion. He is using ibuprofen only p.r.n. He is using a cane frequently for ambulation. He continues to be moderately obese. I have strongly encouraged him to try to lose weight, to ice his kneed bid/tid. I have switched him from ibuprofen to Arthrotec 75 mg b.i.d. because of a history of abdominal discomfort and thinks he may have gastroesophageal reflux disease. He is given samples to try one tab qd for 3 days. If he tolerates this, he may go to 75 mg b.i.d. I have given him a handout about potential side effects and he will take it with food or milk. He should not use Maalox/Mylanta/PeptoBismol while on Arthrotec. If he has indigestion, he may us TUMS, but if the medication bothers him, he should discontinue it immediately. He will be seen back in 2 months. If he is still symptomatic at that time, I likely would inject his knees.

"**X-rays**, weightbearing PA, lateral and Merchant views, show rather significant narrowing bilaterally somewhat greater on the

right than on the left as shown on weightbearing PA with only about 2-3 mm space between the joint surfaces," according to the doctor.

Dr. Wickenden next saw Claimant on November 30, 1998, at which time the doctor reported (CX 12):

"David is seen in long term follow up with regard to his knee. He continues to do fairly well. He finds that while on the Arthrotec his knee is feeling significantly better. He clearly feels that this is helping more than the ibuprofen has helped in the past. He is also working on his weight and states that he has presently lost about 10 pounds. He is not presently working at Bath Iron Works in that no work has been made available to him that he could do. He was offered a job driving but finds that the driving bothers his knee purely because of the positioning of his knee in flexed and varus alignment at the joint. I have encouraged him to continue with active range of motion, to continue to work hard on weight reduction program. He will remain on the Arthrotec 75mg p.o. b.i.d. He will be seen back by me on a three to four months basis for reassessment unless he has problems in the meantime."

As of September 13, 1999 Dr. Wickenden reported as follows (CX 12):

"Mr. Faulkingham has actually lost 25 pounds since he was last seen in November of 1998. He states he has worked very hard on this over the last three months. He finds that he generally feels very significantly better and that his knees are also doing better. Because of the weight loss he also has been able to get off the Arthrotec and is not taking this on a daily basis. He continues to ice his knees. He continues to be on restrictions, which will be permanent and because of this, Bath Iron Works has not allowed him to come back to work. I have talked with David about trying Glucosamine 1500mg daily for two months. I have given him a handout on this and have recommended that he try it over the next two months. If he does not get significant improvement then he could also consider injections with Synvisc. If this were necessary, we would initially inject his right knee followed up by this left knee. He will be seen in two months for reassessment, unless there are problems in the meantime," according to the doctor.

As of December 27, 1999 Dr. Wickenden stated as follows (CX 12):

"David has stopped the Arthrotec since he was last seen by me and has noted progressively increased pain over the last two months. He is no longer working and it sounds as though he has not done so in the last 2 years. He states that he has a frequent sense of catching or locking in his knee. He has pain trying to go up and down stairs. He has marked discomfort walking on uneven ground. He has found that it is essentially impossible for him to dance at the present time and, unfortunately, he has enjoyed doing this in the past. He is no longer taking the Arthrotec and I have encouraged him to go back onto that medication.

"Today the decision was made to inject the right knee. I have injected him with 1 ½ cc of Celestone, 1 ½ cc of DepoMedrol and 3 cc of 0.5% Bupivacaine. I will see him back in 2 months. If he is not significantly improved with this combination then I would encourage him to consider a series of 3 Synvisc injections. If he has problems, prior to that time he'll contact my office for reassessment. I have given him a prescription today for Arthrotec 75 mg to take 1 p.o. b.i.d. This will always be taken with food or milk. He has not had problems taking this in the past."

As of March 10, 2000 the doctor stated as follows (CX 12):

"Mr. Faulkingham is seen in regard to his bilateral knee degenerative arthritis presently being worse on the right than the left. He is not working at the present time, not having been given any work at BIW within his job restrictions. He has full thickness articular cartilage loss in the medial compartments bilaterally. Patient continues to take Arthrotec 75mg p.o. b.i.d. He uses a cane for ambulation. He states that he presently has trouble even working around his house. He has difficulty walking on uneven ground. He is unable to do many of the activities he enjoys on a daily basis. He is here today specifically asking about Synvisc injections. We have discussed this in the past and I have again discussed with him today the anticipated risks and goals of this procedure. He understands that this does not eliminate the need for total knee replacement at a later time but it will hopefully postpone the timing for his total knee replacements.

"After lengthy discussion of the risks and goals, I have sterilely prepped his right knee with Betadine solution. I then injected the supralateral pouch with 3cc of 1% Lidocaine. After satisfactory anesthesia, I then attempted aspiration of his knee

and got no synovial fluid back. I then confirmed that the needle was in the supralateral pouch by injecting air into this area with loss of resistance technique. I then instilled 2cc of Synvisc into the supralateral pouch. Patient will be seen in one week and then two weeks for his series of three Synvisc injections. If he does very well with these injections I would, at a later time, do his left knee with a series of three injections."

As of March 17, 2000 the doctor reported as follows (CX 12):

"David is seen for his second Synvisc injection. He continues to have significant pain in his right knee. He has a frequent sense of buckling. He is using a cane for ambulation. Today I have sterilely prepped his knee. He had no fluid to aspirate. After attempt at aspiration I injected 2cc of Synvisc into the supralateral pouch under sterile technique. He will be seen in one week for his third Synvisc injection."

Dr. Wickenden has also seen Claimant on April 18, 2000 and on June 8, 2000 and, as of that latter examination, the doctor opined that Claimant will eventually need a total knee replacement because of the continuing "bilateral knee pain, right much more than the left." (CX 17) The total knee replacement took place on August 8, 2000. (EX 10)

Dr. Wickenden reiterated his opinions at his April 12, 2000 deposition (CX 14) and his opinions withstood intense cross-examination by Employer's counsel. (CX 14 at 16-32) The total knee replacement took place on August 8, 2000. (EX 10)

The Employer has had Claimant's "medical records" reviewed by its medical expert, Dr. Christopher Brigham, and the doctor states as follows in his November 9, 1998 letter to the Employer (EX 2):

"Thank you for your letter of November 3, 1998 and requesting that I review the Permanent Impairment Assessment performed by Dr. Wickenden. As discussed below, his impairment rating was incorrect, in that he did not interpolate, as the *AMA Guides to the Evaluation of Permanent Impairment*, Fourth Edition, specify.

"You have provided me with his medical records which include his clinical care, operative procedures, opinion of impairment dated April 23, 1998, his most recent record of October 3, 1998.

"My assessment of permanent impairment was done in accordance with *AMA Guides to the Evaluation of Permanent Impairment, 4th Ed.* I relied upon the medical information for the medical evaluation aspect of the rating. This provided an adequate database. To a reasonable degree of medical certainty he is at maximum medical improvement.

"In terms of his medical situation, the following diagnoses are present:

1. Complex tearing of the median meniscus, left knee, with Grade 3 chondromalacia of the medial femoral condyle, and Grade 4 chondromalacia of the anterior peripheral margin of the medial tibial plateau, status post diagnostic arthroscopy, left knee, with arthroscopic medial meniscectomy, debridement and shaving of medial femoral condyle and medial tibial plateau, October 16, 1997.

2. Extensive complex tearing of the median meniscus, mid and posterior portions, right knee, Grade 4 chondromalacia of the medial tibial plateau underlying meniscus tear, Grade 2 chondromalacia of mid weight-bearing surface, medial femoral condyle, status post diagnostic arthroscopy, right knee, with partial medial meniscectomy, joint debridement and lovage, June 26, 1997.

"**AMA *Guides*: Lower Extremity Impairment Assessment**

In the Fourth edition of the *Guides*, anatomic, diagnostic, and functional methods are used to assess permanent impairment. In general, only one evaluation must follow the process also outlined in Chapter 2 of the *Guides*. The process of assessing the lower extremity is discussed in Section 3.2, pages 75-93.

"**Critique of Impairment Assessment**

Dr. Wickenden opines in his report of April 23, 1998 that there is a 20% impairment of each lower extremity, based on the findings of a torn median meniscus with Grade 4 chondromalacia of the medial tibial plateau, and Grade 3 chondromalacia of the medial femoral condyle bilaterally. He states, "These values are on the basis of the *AMA Guides to the Evaluation of Permanent Impairment*", however, fails to reference specific models, tables or other criteria. It is noted in his more recent note of October 9, 1998 that he does reference the joint

space narrowing of the knees, stating, “Rather significant narrowing bilaterally somewhat greater on the right than on the left as shown on weight-bearing PA with only about 2-3 mm. space between the joint surfaces.”

“**Permanent Impairment Assessment**

In assessing impairment in this case, two applicable models are 3.2G Arthritis (pages 82-83) and diagnosis-based estimates (page 84-88). For joint space narrowing of the knee of 2 mm, there is a 20% lower extremity impairment assessment and for 3 mm. there is a 7% whole person impairment assessment. It is assumed, however not verified, that the 20% lower extremity rating was obtained on the basis of this process. Dr. Wickenden however did not interpolate. The ***Guides*** state, “In general, impairment value that falls between those appearing in the table or figure of the ***Guides*** may be adjusted or interpolated to be proportional to the interval of the table or figure involved, unless the book gives other directions.” (***Guides***, page 8). With the reported joint space internal being 2-3 mm., Dr. Wickenden should have interpolated between 20% lower extremity and 7% lower extremity. The mid-point is 13.5% lower extremity, and this would be the rating on the basis of arthritis.
An alternative model is using a diagnosis-based estimate. For his partial medial meniscectomy, according to Table 64, Impairment Estimates for Certain Lower Extremity Impairments (page 85), there would be a 2% lower extremity rating.

Other models in Section 3.2 are not applicable to this case. The evaluator should select between the arthritis and the diagnosis-based estimate, since this injury does not involve a joint fracture. It would be appropriate to select the higher impairment based upon arthritis.

His impairment therefore is 13.5% of each lower extremity, which corresponds to 5% whole person impairment (**e.g.**, lower extremity value multiplied by 40%). Alternatively, if one took the whole person mid-range between 2 mm. and 3 mm., **e.g.**, between 8 and 3, the corresponding whole person impairment is 5.5%. The combined value of the two ratings is 11% whole person.

“**Summary**

In summary, with appropriate application of the *AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition*, and

interpolating as specifically directed in the *Guides*, the corrected impairment assessment is 11% whole person. It is noted in this assessment that my conclusions are based upon the medical information provided, and I have not assessed the issue of the work-relatedness of his underlying condition.

"**Qualifications**

My comments are based upon specifics of this case and my knowledge, skills and abilities in this domain. I serve as Editor-in-Chief of the AMA publication the *Guides Newsletter* and have trained thousands of physicians throughout the US, Canada and Australia on how to use the AMA *Guides to the Evaluation of Permanent Impairment*. I am also Board-Certified in Occupational Medicine, Director of the American Board of Independent Medical Examiners, a Certified Independent Medical Examiner, a Fellow of the American Academy of Disability Evaluating Physicians, and a Fellow of the American College of Occupational Environmental Medicine. The enclosed **curriculum vitae** outlines my presentations, publications and other accomplishments in the field of impairment and disability assessment..."

The doctor's **Curriculum Vitae** is part of that letter to the Employer. (**Id.**)

Claimant leads a mostly sedentary life as any exertion exacerbates his bilateral knee pain. He has been told that eventually he will require bilateral knee replacements but the doctor wants him to defer such surgeries as long as possible. He has contacted the Employer to obtain work within his restrictions but the Employer has provided no such work for him. He has looked for work but no one will hire him because of his restrictions. He did admit that he goes shopping and that he plays while seated several musical instruments for a group called "**The Wing Nuts**," that he plays several times per month, from 7 p.m. to 10 p.m. at the local Grange Hall, that the group is reimbursed, on a 50-50 split of the admission receipts, Claimant remarking that senior citizens are not charged admission and that he did play in the band on March 25, 2000. (TR 21-52)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a most credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shifts the burden of proof to the employer." **U.S. Industries/Federal Sheet**

Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue, resolving all doubts in claimant's favor. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

The U.S. Court of Appeals for the First Circuit has considered the Employer's burden of proof in rebutting a **prima facie** claim under Section 20(a) and that Court has issued a most significant decision in **Bath Iron Works Corp. v. Director, OWCP (Shorette)**, 109 F.3d 53, 31 BRBS 19(CRT)(1st Cir. 1997).

In **Shorette**, the United States Court of Appeals for the First Circuit, in whose jurisdiction this case arises, held that an employer need not totally rule out any possible causal relationship between a claimant's employment and his condition in order to establish rebuttal of the Section 20(a) presumption. The court held that employer need only produce substantial evidence that the condition was not caused or aggravated by the employment. **Id**., 109 F.3d at 56,31 BRBS at 21 (CRT); **see also Bath Iron Works Corp. v. Director, OWCP [Hartford]**, 137 F.3d 673, 32 BRBS 45 (CRT)(1st Cir. 1998). The court held that requiring an employer to rule out totally any possible connection between the injury and the employment goes beyond the statutory language presuming the compensability of the claim "in the absence of substantial evidence to the contrary." 33 U.S.C. §920(a). **See Shorette,** 109 F.3d at 56, 31 BRBS at 21 (CRT). The totally "ruling out" standard was recently addressed and rejected by the Court of Appeals for the Fifth and Seventh Circuits as well. **Conoco, Inc. v. Director, OWCP [Prewitt]**, 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999); **American Grain Trimmers, Inc. v. OWCP**, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); **see also O'Kelley v. Dep't of the Army/NAF**, 34 BRBS 39 (2000); **but see Brown v. Jacksonville Shipyards, Inc.**, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990) (affirming the finding that the Section 20(a) presumption was not rebutted because no physician expressed an opinion "ruling out the possibility" of a causal relationship between the injury and the work).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director,**

OWCP, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by “substantial evidence to the contrary” offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not “play a significant role” in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee’s condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant’s pulmonary problems are consistent with cigarette smoking rather

than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Employer disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128

(1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Sir Gean Amos v. Director, OWCP**, 153 F.3d 480 (9th Cir. 1998), **amended**, 164 F.3d 480, 32 BRBS 144 (CRT)(9th Cir. 1999).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his bilateral degenerative arthritis of the knee, resulted from working conditions at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary

factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should become have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

This closed record conclusively establishes, and I so find and conclude, that Claimant’s thirty plus years of maritime employment have resulted in bilateral knee problems diagnosed as degenerative arthritis, that the Claimant reported such problems to the Employer on April 2, 1997 (CX 13), that the date of injury is April 2, 1997, that the Employer timely controverted Claimant’s entitlement to benefits by form dated April 4, 1997 (CX 2), that Claimant timely filed for benefits on or about June

18, 1997 (CX 4) and that the Employer has authorized certain medical care and treatment and has paid certain compensation benefits to Claimant as stipulated by the parties (TR 6) and as corroborated by the record. (CX 6) In fact, the principal issue is the nature and extent of Claimant's disability, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review**

Board, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

Sections 8(a) and (b) and Total Disability

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Sections 8(a) and (b) by a showing that he/she is totally disabled. **Potomac Electric Power Co. v. Director**, 449 U.S. 268 (1980) (herein "**Pepco**"). **Pepco**, 449 U.S. at 277, n.17; **Davenport v. Daytona Marine and Boat Works**, 16 BRBS 1969, 199 (1984). However, unless the worker is totally disabled, he is limited to the compensation provided by the appropriate schedule provision. **Winston v. Ingalls Shipbuilding, Inc.**, 16 BRBS 168, 172 (1984).

Two separate scheduled disabilities must be compensated under the schedules in the absence of a showing of a total disability, and claimant is precluded from (1) establishing a greater loss of wage-earning capacity than the presumed by the Act or (2) receiving compensation benefits under Section 8(c)(21). Since Claimant suffered injuries to more than one member covered by the schedule, he must be compensated under the applicable portion of Sections 8(c)(1) - (20), with the awards running consecutively. **Potomac Electric Power Co. v. Director, OWCP**, 449 U.S. 268 (1980). In **Brandt v. Avondale Shipyards, Inc.**, 16 BRBS 120 (1984), the Board held that claimant was entitled to two separate awards under the schedule for his work-related injuries to his right knee and left index finger.

On the basis of the totality of this closed record, I find and conclude that Claimant has established he cannot return to work as an electrician. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit probative and persuasive evidence as to the availability of suitable alternate employment, as discussed further below. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on**

reconsideration after remand, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability.

Claimant's injury has not become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597

F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

On the basis of the totality of the record, I find and conclude that Claimant has not yet reached maximum medical improvement because of his recent surgery on August 8, 2000 (CX 17) and because he has not recovered therefrom. Any change in condition can be resolved in a subsequent Section 22 proceeding.

With reference to Claimant’s transferrable skills and his residual capacity, an employer can establish suitable alternate

employment by offering an injured employee a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. **Walker v. Sun Shipbuilding and Dry Dock Co.**, 19 BRBS 171 (1986); **Darden v. Newport News Shipbuilding and Dry Dock Co.**, 18 BRBS 224 (1986). Claimant must cooperate with the employer's re-employment efforts and if employer establishes the availability of suitable alternate job opportunities, the Administrative Law Judge must consider claimant's willingness to work. **Trans-State Dredging v. Benefits Review Board, U.S. Department of Labor and Tarner**, 731 F.2d 199 (4th Cir. 1984); **Roger's Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986). An employee is not entitled to total disability benefits merely because he does not like or desire the alternate job. **Villasenor v. Marine Maintenance Industries, Inc.**, 17 BRBS 99, 102 (1985), **Decision and Order on Reconsideration**, 17 BRBS 160 (1985).

An award for permanent partial disability in a claim not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21)(h); **Richardson v. General Dynamics Corp.**, 23 BRBS (1990); **Cook v. Seattle Stevedoring Co.**, 21 BRBS 4, 6 (1988). If a claimant cannot return to his usual employment as a result of his injury but secures other employment, the wages which the new job would have paid at the time of claimant's injury are compared to the wages claimant was actually earning pre-injury to determine if claimant has suffered a loss of wage-earning capacity. **Cook**, **supra**. Subsections 8(c)(21) and 8(h) require that wages earned post-injury be adjusted to the wage levels which the job paid at time of injury. **See Walker v. Washington Metropolitan Area Transit Authority**, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986); **Bethard v. Sun Shipbuilding & Dry Dock Co.**, 12 BRBS 691, 695 (1980).

It is now well-settled that the proper comparison for determining a loss of wage-earning capacity is between the wages claimant received in his usual employment pre-injury and the wages claimant's post-injury job paid **at the time of his injury**. **Richardson**, **supra**; **Cook**, **supra**.

The parties herein now have the benefit of a most significant opinion rendered by the First Circuit Court of

Appeals in affirming a matter over which this Administrative Law Judge presided. In **White v. Bath Iron Works Corp.**, 812 F.2d 33 (1st Cir. 1987), Senior Circuit Court Judge Bailey Aldrich framed the issue as follows: "the question is how much claimant should be reimbursed for this loss (of wage-earning capacity), it being common ground that it should be a fixed amount, not to vary from month to month to follow current discrepancies." **White**, **supra**, at 34.

Senior Circuit Judge Aldrich rejected outright the employer's argument that the Administrative Law Judge "must compare an employee's post-injury actual earnings to the average weekly wage of the employee's time of injury" as that thesis is not sanctioned by Section 8(h).

Thus, it is the law in the First Circuit that the post-injury wages must first be adjusted for inflation and then compared to the employee's average weekly wage at the time of his injury. That is exactly what Section 8(h) provides in its literal language.

While there is no obligation on the part of the Employer to rehire Claimant and provide suitable alternative employment, **see**, **e.g.**, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), **rev'g and rem. on other grounds Tarner v. Trans-State Dredging**, 13 BRBS 53 (1980), the fact remains that had such work been made available to Claimant years ago, without a salary reduction, perhaps this claim might have been put to rest, especially after the Benefits Review Board has spoken herein and the First Circuit Court of Appeals, in **White**, **supra**.

The law in this area is very clear and if an employee is offered a job at his pre-injury wages as part of his employer's rehabilitation program, this Administrative Law Judge can find that there is no lost wage-earning capacity and that the employee therefore is not disabled. **Swain v. Bath Iron Works Corporation**, 17 BRBS 145, 147 (1985); **Darcell v. FMC Corporation, Marine and Rail Equipment Division**, 14 BRBS 294, 197 (1981). However, I am also cognizant of case law which holds that the employer need not rehire the employee, **New Orleans (Gulfwide) Stevedores, Inc. v. Turner**, 661 F.2d 1031, 1043 (5th Cir. 1981), and that the employer is not required to act as an employment agency. **Royce v. Elrich Construction Co.**, 17 BRBS 157 (1985).

In the case at bar the Employer has offered the February 18, 2000 supplemental report of Arthur M. Stevens, Jr., the Employer's vocational consultant. Mr. Stevens has also authored a Labor Market Survey, dated February 14, 2000, wherein he opines that Claimant has transferrable skills and residual work capacity to perform work, within his restrictions, and that he could earn "at least $6.50 per hour and as much s $8.50 per hour to start in an entry level position." Mr. Stevens identified such work as:

Mr. Stevens identified approximately 26 positions, which he deemed to be worthy of the Claimant's follow-up through direct employer contacts. These were businesses that Mr. Stevens contacted at random, rather than being identified based on advertisements for help. The Direct Employer Contact section of the survey identifies the date of contact; the employer and location; the telephone number and contact person; the openings and qualifications for same; whether the job was part or full time; salary amounts, if available; benefits; and physical requirements of the position. Additionally, on a number of these jobs, Mr. Stevens actually visited the job site and observed the position for anywhere from 30 minutes to one hour. He has provided a Job Analysis section starting on page 36 of his survey, which sets forth his observations for these particular jobs relative to the physical demands of the position, the working conditions, the general education necessary, and the job training time. At the time of his deposition, Mr. Stevens identified two additional positions contained with the Direct Employer Contact section, which he also felt were appropriate for the claimant's follow up, but which we had not previously highlighted.

Mr. Stevens also identified approximately five positions from the newspaper advertisements, which he felt were worthy of follow up. From both the newspaper ads and the employer contacts, Mr. Stevens identified numerous positions in the area of customer service, cashiers, electronic assembly, security, and front desk/night auditor positions.

For instance, Mr. Stevens also identified four different types of positions at Maine Scientific, Inc., in Brunswick, including precision solderers and winders, and positions in quality control and copying. He noted that in the past six months (as of February 8, 2000) Maine Scientific had hired two full-time and one part-time employee. They anticipated nine to 11 additional openings within the next 60 days. No high school

diploma was required (though the claimant does have his high school diploma). The qualifications included good hand/eye coordination for most positions, with the employer being willing to train. The salary started at $7.50 an hour, with an increase to $8.00 within 30 days. Benefits were also available after a probationary period. It was also noted that all positions are light duty positions, and that the employer was willing to consider any reasonable accommodations for anyone with restrictions. It was specifically noted that the positions were primarily sedentary, but that employees were allowed to stand as needed for comfort. Stretch breaks are required by this employer, according to Mr. Stevens.

Similarly, Electrotech, Inc., in Rockland, was contacted on December 17, 1999. This is an electronic assembly business, which had hired several positions in the previous six months. Openings in the future would depend on contracts awarded. A high school diploma was not required; good eye/hand coordination was needed; and the employer was willing to train. This was a full-time position, paying $6.00 an hour. The employer noted that it was very light duty, with the ability to change positions as needed, with both sitting and standing. Very minimal light lifting was required, with no computer usage required.

Another identified position was with Hall Security in Camden and Rockland. While this position did not have any openings at the time of the inquiry (January 24, 2000) the employer noted that they had hired several part-time security positions in the past six months and openings in the near future were expected for several security guard positions in the Rockland area. This employer was willing to train and paid approximately $5.00 to $7.00 an hour. In addition, benefits were available for full-time employees. This is a light duty security position, which allowed the individual to be able to change positions as needed, with lifting or climbing required. The position also might include the need to walk five to ten minutes every 90 minutes.

Mr. Stevens noted in his survey that based on the Claimant's previous work experiences, his education, and his physical capacity, it was reasonable to expect that the Claimant could earn at least $6.50 per hour and as much as $8.50 per hour to start at an entry level position. The three jobs outlined above, as well as many others identified, clearly fall within the Claimant's education level and physical capacity. While Mr. Stevens assumed that the Claimant might be able to sit for a

couple of hours, or perhaps even less (CX #15 at 6), he further testified that he did not believe that any of the jobs identified as suitable for Mr. Faulkingham would require sitting for two hours (CX 15 at 30). Furthermore, according to Dr. Wickenden's testimony, the Claimant need only be able to stretch his legs out five to ten times in order to lubricate the knee joint. Therefore, even if the job required sitting for the majority of the time, as long as the Claimant was able to put his knees through a range of motion (as these employers have identified that the employees can do), it does not appear that there would be a problem with those positions.

Dr. Wickenden was asked to specifically review a few of the positions identified in Mr. Stevens' Labor Market Survey. The position at Electrotech, Inc. in Rockland, on page 31 of the Labor Market Survey, was identified as a position which Dr. Wickenden felt the claimant was capable of performing. While he expressed some concern with regard to the job being 40 to 45 hours per week, he simple expressed a desire to have the Claimant return to work part-time and then work into a full-time position. This was based on the fact that Mr. Faulkingham had not worked for the previous two years (CX 14 at 27). Another position identified was a greater position at Wal-Mart Department Store in Brunswick. Dr. Wickenden commented that he had two patients were greeters at Wal-Mart and who have arthritis. He stated that both patients were uncomfortable on this job; however, he did indicate that their complaints were prolonged periods of standing, but indicated that if a chair or stool were provided that would be helpful. (CX 14 at 27-28)

The third position identified was a security position with MBNA. The Claimant testified that, after reviewing a list of jobs provided to him by his attorney from the Labor Market Survey, he called MBNA. His inquiry ended by being told by the woman who answered the phone that he would not be able to do all the walking involved. (TR at 25) Dr. Wickenden testified that one of his patients was currently working at the security desk at MBNA, opening doors and watching individuals coming in and out of the building. He stated that his patient was doing quite well in this position, though he did not do as well in a position that required walking long distances around the property. He did, however, indicate that a security position that allowed the employee to walk on ground level, without any inclines, would probably be appropriate. (CX 14 at 32-33) Dr. Wickenden also agreed that Claimant should be capable of performing a job at Maine Scientific in Brunswick, which is

located on page 37 of the Labor Market Survey. He also agreed that the Video Galaxy position in Rockland, on page 42 of the Survey, appeared to be appropriate, so long as it did not include long periods of walking (CX 14 at 28-29).

The last position presented to Dr. Wickenden was that of a cashier at Puffin Stop, a convenience store, set forth on page 46 of the Survey. Dr. Wickenden stated that he believed that this was a job that the Claimant could do; however, he believed it was appropriate to identify the amount of bending and lifting actually involved in that position, as he had another patient who was unable to perform the job. He did state, however, that if the Claimant was behind a cash register and able to sit and stand, he could perform the job. He also went on to state that another cashier position, not necessarily at Puffin Stop, but perhaps at another convenience store or at a gas station, which allowed the employee to sit and stand as needed, would be appropriate. (CX 14 at 29)

Furthermore, while the Claimant has raised some concern regarding driving and the discomfort it produces, Dr. Wickenden actually testified that by placing the seat of his car back as far as possible, and stopping to put his knee through a range of motion, the Claimant would be batter able to tolerate driving. (CX 14 at 24, 34) He specifically testified that, for example, for a drive from Rockland (near the Claimant's home) to Portland (which is approximately 81 miles according to the milage chart in the front of Art Stevens' Labor Market Survey), he would advise patients with osteoarthritis to stop at least twice along the way to put their knee through a range of motion. This distance is considerably more than any of the jobs identified in the Labor Market Survey.

There was also some suggestion by Claimant's counsel when questioning Mr. Stevens, that Claimant did not necessarily show any signs of interest in customer service positions. It should be noted, however, that Dr. Wickenden testified that the Claimant was an exemplary patient, a very "delightful guy," who was very bright and had no problems communicating with his physician. (CX 14 at 20) Furthermore, the Claimant testified to being an entertainer, who was a lead singer in a band that played approximately two times a month. The Claimant plays the guitar, harmonica, fiddle, and mandolin. This testimony also is related to his physical capacity, as he testified that he would play for three hours, with sets lasting approximately one hour each with stretch breaks in between. (TR at 51)

However, I agree with the Claimant's thesis for the following reasons:

No one disputes that Mr. Faulkingham is not able, with his restrictions, to return to the job he was doing when he developed problems with his knees. He clearly cannot work on his knees hauling cables up from the lower levels of the ships. Consequently, Bath Iron Works has the burden of proving that there is suitable alternate employment for Mr. Faulkingham. In an attempt to show this, they hired Arthur Stevens to do a labor market survey. This labor market survey does not meet the burden of showing suitable alternate employment.

The first and most obvious deficit in the labor market survey is that Mr. Stevens began with a faulty set of assumptions about what Mr. Faulkingham's limitations are currently. He states in his deposition that he interpreted the restriction against prolonged sitting and/or standing to mean that Mr. Faulkingham could sit and stand two hours or more at a stretch. However, Dr. Wickenden made it clear in his deposition that no prolonged standing or sitting meant no more than an hour. Consequently, Mr. Stevens assumed in evaluating the suitability of jobs, that Mr. Faulkingham could sit or stand for periods of time twice as long as his doctor actually allows. Given this very significant incorrect assumption about Mr. Faulkingham's ability, Mr. Stevens' opinion about which jobs Mr. Faulkingham could do are not valid. Mr. Stevens also did not consider Mr. Faulkingham's limited ability to commute, which further undermines his opinion.

Secondly, Mr. Faulkingham has introduced evidence that rebuts the labor market survey. First, he himself contacted some of the most likely employers, in particular, MBNA. He discovered that the security jobs would require a great deal of walking and stair climbing. Finally, and most persuasively, Dr. Wickenden testified based on the experience of his other patients, that jobs such as the security job at MBNA or a greeter at Wal-Mart, in fact require a great deal more standing and walking that Mr. Stevens reported in his survey, or than Mr. Faulkingham is capable of.

Given that this rebuttal evidence shows the most promising of the job opportunities identified in the labor market survey are not in fact suitable, it casts doubt on the validity of all of Mr. Stevens' opinion and his entire report. Consequently, this Court finds that Bath Iron Works has not met its burden of

showing the existence of suitable alternate employment, and I so find and conclude.

As indicated above, the Employer has offered a Labor Market Survey (EX 6) in an attempt to show the availability of work for Claimant as a customer service representative and a greeter and a cashier, as well as an electronic assembler, as a security guard, as a front desk and/or night auditor at a hotel/motel or at a desk position at Yankee Lanes. I cannot accept the results of that very superficial survey which apparently consisted of the counsellor making a number of telephone calls to prospective employers. While the report refers to personal contacts with area employers, I simply cannot conclude, with any degree of certainty, which prospective employers were contacted by telephone and which job sites were personally visited to observe the working conditions to ascertain whether that work is within the doctor's restrictions and whether Claimant can physically do that work.

It is well-settled that Employer must show the availability of actual, not theoretical, employment opportunities by identifying specific jobs available for Claimant in close proximity to the place of injury. **Royce v. Erich Construction Co.**, 17 BRBS 157 (1985). For the job opportunities to be realistic, the Respondents must establish their precise nature and terms, **Reich v. Tracor Marine, Inc.**, 16 BRBS 272 (1984), and the pay scales for the alternate jobs. **Moore v. Newport News Shipbuilding & Dry Dock Co.**, 7 BRBS 1024 (1978). While this Administrative Law Judge may rely on the testimony of a vocational counselor that specific job openings exist to establish the existence of suitable jobs, **Southern v. Farmers Export Co.**, 17 BRBS 64 (1985), employer's counsel must identify specific available jobs; generalized labor market surveys are not enough. **Kimmel v. Sun Shipbuilding & Dry Dock Co.**, 14 BRBS 412 (1981).

The Labor Market Survey and the addendum (EX 6) cannot be relied upon by this Administrative Law Judge for the more basic reason that there is a complete absence of any information about the specific nature of the duties of the jobs identified by Mr. Stevens, etc., and whether such work is within the doctor's physical restrictions. Thus, this Administrative Law Judge has absolutely no idea as to what are the specific duties of those jobs, at the firms identified by Mr. Stevens.

I also note that Dr. Wickenden does not believe that Claimant can return to work initially at 40 hours per week, that he should gradually phase in his work week and that some of the doctor's other patients, with similar orthopedic problems, could not perform those duties.

Thus, I find and conclude that Claimant is temporarily and totally disabled until such time as he recovers from his bilateral knee surgeries. Moreover, it is recommended that Claimant be retrained for other fields of endeavor if he is to return to gainful employment.

I am cognizant of the fact that the controlling law is somewhat different on the employer's burden in the territory of the First Circuit when faced with a claim for permanent total disability benefits. In **Air America, Inc. v. Director, OWCP**, 597 F.2d 773, 10 BRBS 490 (1st Cir. 1978), the United States Court of Appeals for the First Circuit held that it will not impose upon the employer the burden of proving the existence of actual available jobs when it is "obvious" that there are available jobs that someone of Claimant's age, education and experience could do. The Court held that, when the employee's impairment only affects a specialized skill necessary for his pre-injury job, the severity of the employer's burden had to be lowered to meet the reality of the situation. In **Air America**, the Court held that the testimony of an educated pilot, who could no longer fly, that he received vague job offers, established that he was not permanently disabled. **Air America**, 597 F.2d at 778, 780, 108 BRBS at 511-512, 514. Likewise, a young intelligent man was held to be not unemployable in **Argonaut Insurance Co. v. Director, OWCP**, 646 F.2d 710, 13 BRBS 297 (1st Cir. 1981).

As noted above, once claimant establishes that he is unable to do his usual work, he has established a **prima facie** case of total disability and the burden shifts to employer to establish the availability of suitable alternative employment which claimant is capable of performing. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031, 1032, 14 BRBS 156, 165 (CRT) (5th Cir. 1981). In order to meet this burden, employer must show the availability of job opportunities within the geographical area in which he was injured or in which claimant resides, which he can perform given his age, education, work experience and physical restrictions, and for which he can compete and reasonably secure. **Turner**, **supra**; **Roger's Terminal**

& Shipping Corp. v. Director, OWCP, 784 F.2d 667, 671, 18 BRBS 79, 83 (CRT) (5th Cir. 1986); **Mijangos v. Avondale Shipyard, Inc.**, 19 BRBS 165 (1986). A job provided by employer may constitute evidence of suitable alternative employment if the tasks performed are necessary to employer, **Peele v. Newport News Shipbuilding & Dry Dock**, 18 BRBS 224, 226 (1987), and if the job is available to claimant. **Wilson v. Dravo Corp.**, 22 BRBS 463, 465 (1989); **Beaulah v. Avis Rent-A-Car**, 19 BRBS 131, 133 (1986). Moreover, employer is not actually required to place claimant in alternate employment, and the fact that employer does not identify suitable alternative employment until the day of the hearing does not preclude a finding that employer has met its burden. **Turney v. Bethlehem Steel Corp.**, 17 BRBS 232, 236-237 n.7 (1985). Nonetheless, the Administrative Law Judge may reasonably conclude that an offer of a position within employer's control on the day of the hearing is not **bona fide**. **Diamond M Drilling Co. v. Marshall**, 577 F.2d 1003, 1007-9 n.5, 8 BRBS 658, 661 n.5 (5th Cir. 1979); **Jameson v. Marine Terminals**, 10 BRBS 194, 203 (1979).

Air America, supra, deals with a well-educated airplane pilot and the case before me deals with an employee, with a high school diploma and who has an employment history of manual labor.

As there is no requirement that Claimant be totally bedridden to be awarded total disability benefits, even though he plays in band several times a month more for his personal enjoyment, I find and conclude that Claimant is temporarily and totally disabled, that he is entitled to resumption of compensation benefits, based upon the stipulated average weekly wage, and that an appropriate award shall be entered herein. As noted above, I agree with Claimant that the Employer’s Labor Market Survey is defective as not taking into account the recent surgery and his current inability to return to work at any job.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the

employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer timely controverted Claimant's entitlement to benefits. (EX 2) **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16

BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless

such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of his work-related injury on April 2, 1997 (CX 13) and requested appropriate medical care and treatment. However, while the Employer did accept the claim, it did not authorize certain medical care until almost three months after the hearing by letter dated July 11, 2000 (CX 18). Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer as a self-insurer. Claimant's attorney filed a fee application on July 24, 2000 (CX 20), concerning services rendered and costs incurred in representing Claimant between and October 14, 1999 and July 17, 2000. Attorney Marcia J. Cleveland seeks a fee of $5,440.89 (including expenses) based on 24.90 hours of attorney time at $185.00 per hour.

The Employer has objected to the requested attorney's fee as excessive in view of the benefits obtained and the hourly rate charged. (EX 9)

In accordance with established practice, I will consider only those services rendered and costs incurred after September 16, 1999, the date of the informal conference. Services

rendered prior to this date should be submitted to the District Director for her consideration.

In light of the nature and extent of the excellent legal services rendered to Claimant by his attorney, the amount of compensation obtained for Claimant and the Employer's comments on the requested fee, I find a legal fee of $5,440.89 (including expenses of $1,142.39) is reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. §702.132, and is hereby approved. The expenses are approved as reasonable and necessary litigation expenses. My approval of the hourly rates is limited to the factual situation herein and to the firm member identified in the fee petition. This matter has been successfully prosecuted with a most reasonable number of hours and the fee petition as filed is hereby approved.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer as a self-insurer shall pay to the Claimant compensation for his temporary total disability from June 26, 1997 through the present and continuing, based upon the average weekly wage of $716.59, such compensation to be computed in accordance with Section 8(b) of the Act.

2. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his April 2, 1997 injury.

3. Interest shall be paid by the Employer on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

4. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant’s work-

related injury referenced herein may require, subject to the provisions of Section 7 of the Act.

5. The Employer shall pay to Claimant's attorney, Marcia J. Cleveland, the sum of $5,440.89 (including expenses) as a reasonable fee for representing Claimant herein after September 16, 1999 before the Office of Administrative Law Judges between October 14, 1999 and July 17, 2000.

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DAVID W. DI NARDI
Administrative Law Judge

Dated:

Boston, Massachusetts
DWD:jl